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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 472

IN THE MATTER OF
LUSTRON CORPORATION,
BANKRUPT.

LAFAYETTE STEEL CO., INC.,
Petitioner,

vs.

LUSTRON CORPORATION, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 184 F. (2d) 798. The opinion is also printed in full in the record (R. 321-326).

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered October 23, 1950 (R. 327). Petition for rehearing was denied November 10, 1950 (R. 328). The petition for a writ of certiorari was filed on December 29, 1950. The jurisdiction of this court is invoked by petitioner under Title 28, U. S. C., section 1254(1).

QUESTION PRESENTED.

Whether a non-bankruptcy court, in a general equity insolvency proceeding instituted within four months prior to the filing of a bankruptcy proceeding against the insolvent, has the power, after supervening bankruptcy and with knowledge thereof, to continue to administer and dispose of unencumbered assets of the bankrupt by confirming a sale of such assets theretofore held.

STATEMENT OF THE CASE.

The respondents deem it advisable to make a restatement of the case because the statement of the petitioner is incomplete.

On February 21, 1950, Reconstruction Finance Corporation filed its complaint against Lustron Corporation in the United States District Court for the Southern District of Ohio, Eastern Division,[1] seeking first, to obtain a money judgment against Lustron, second, to foreclose certain chattel mortgages and third, to place Lustron under a general equity receivership because it was insolvent (R. 59, 60). On March 6, 1950, the Ohio court appointed a receiver[2] of Lustron and of all of its property, assets and rights (R. 216) and restrained all creditors of Lustron from taking any action against Lustron (R. 218). On May 15, 1950, the Ohio Court ordered its receiver to sell on June 6, 1950, at public auction, unencumbered personal property of Lustron. The order provided that the sale was subject to confirmation by the Ohio Court (R. 257). The petitioner was the highest bidder at the auction. On the day the auction was held the Ohio receiver filed a motion for an order confirming the sale (R. 262).

Two days later, on June 8, 1950, which was within four months after the institution of the general equity receivership in the Ohio Court and prior to that court's confirmation of its receiver's sale, an involuntary petition in bankruptcy against Lustron was filed in the United States District Court for the Northern District of Illinois, East-

1. The United States District Court for the Southern District of Ohio, Eastern Division is, for convenience, referred to as the "Ohio Court."

2. The receiver appointed by the Ohio Court is, for convenience, referred to as the "Ohio receiver."

ern Division[3] (R. 2). On the same day, June 8, 1950, the Bankruptcy Court entered its restraining order enjoining the Ohio receiver and the parties to the Ohio proceeding from proceeding to have the sale confirmed (R. 6).

On June 9, 1950, the Ohio Court was informed of the restraining order (R. 143) and the attorneys for the Ohio receiver were served with a copy of it (R. 15). On June 12, 1950, the Ohio Court, disregarding the restraining order and the pendency of the bankruptcy proceeding, entered an order purporting to confirm its receiver's sale (R. 291). However, the receiver refused to transfer "title, possession or custody" of the property (R. 293, 294) in view of the Bankruptcy Court's restraining order.

Thereafter, on June 27, 1950, the petitioner filed its petition in the Bankruptcy Court requesting modification of the restraining order to permit the Ohio receiver to issue instruments of conveyance and deliver possession of the property (R. 12-18). The Bankruptcy Court on July 6, 1950, held that petitioner was, prior to confirmation, merely an offerer or bidder at the Ohio receiver's sale, and dismissed its petition and denied its motion for leave to intervene for the purpose of modifying the restraining order (R. 302, 302-A). The Court of Appeals for the Seventh Circuit affirmed the order of the Bankruptcy Court (R. 327).

3. The United States District Court for the Northern District of Illinois, Eastern Division, is, for convenience, referred to as the "Bankruptcy Court."

SUMMARY OF ARGUMENT.

I. The case is not within the purview of Rule 38.5 of this Court.

II. The petition should be denied for failure to comply with Rules 38.2 and 27 of this Court.

III. A non-bankruptcy court does not have the power, after the supervention of bankruptcy and with knowledge thereof, to confirm a sale of unencumbered assets of the bankrupt ordered in a general equity receivership instituted within four months prior to the filing of the petition in bankruptcy.

IV. The proviso of section 67a (3) of the Bankruptcy Act affords the petitioner no relief, since the petitioner, as the highest bidder at a judicial sale subject to confirmation, had not acquired the title of a bona fide purchaser.

V. The decision of the Court of Appeals is not contrary to any policy concerning the stability of judicial sales.

ARGUMENT.

I.

The Case Is Not Within the Purview of Rule 38.5 of This Court.

A review on writ of certiorari under Rule 38.5 is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Such reasons are not presented in this case.

Petitioner attempts to come within the purview of Rule 38.5(b) by urging that the Court of Appeals has decided an important question of Ohio law in conflict with Ohio decisions and an important question of federal law not settled by this Court.

The Ohio law does not apply, for the sale in question is governed by the provisions of Title 28 U. S. C. sec. 2004. Moreover, the Ohio law with respect to judicial sales is in accord with the decision of the Court of Appeals in this case and the decisions generally of other Federal Courts on the subject.

The Court of Appeals decided the issue in this case squarely in accordance with the doctrines laid down in *Taylor* v. *Sternberg*, 293 U. S. 470, *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734 and *In re Diamond's Estate*, 259 F. 70 (C. A.—6). Petitioner does not even mention these and related cases in its petition, although the Court of Appeals, after discussing these cases, said, "what we have said should dispose of the case finally and completely" (R. 324).

The question here involved, therefore, has been settled

by this Court, and the conclusion of the Court of Appeals is based on the prior applicable decisions of this Court and is not a departure from the accepted and usual course of judicial proceedings in bankruptcy.

The writ of certiorari will not be granted merely to afford a review of the application of settled principles of law where the propriety of the application is dependent upon the facts peculiar to the particular case.

This case does not require the exercise of supervision by this Court, and it is, therefore, submitted that the petition for a writ of certiorari should be denied.

II.

The Petition Should Be Denied for Failure to Comply With Rules 38.2 and 27 of This Court.

Rule 38.2 provides that "a supporting brief may be annexed to the petition or presented separately, but it must be direct and concise (See Rules 26 and 27). A failure to comply with these requirements will be a sufficient reason for denying the petition." Rule 27 provides for the contents and order of the brief. Petitioner, in violation of Rule 38.2, has attempted to support its petition with a brief and argument which are not annexed to the petition nor presented separately but are inextricably interwoven in its petition. The "Reasons for Granting the Writ," appearing on pages 7 through 15 of the petition, are an admixture of reasons, points, authorities, footnotes and argument, most of which is the proper subject matter of a supporting brief rather than a petition.

The petition merits denial for violation of Rules 38.2 and 27.

III.

A Non-Bankruptcy Court Does Not Have the Power, After the Supervention of Bankruptcy and With Knowledge Thereof, to Confirm a Sale of Unencumbered Assets of the Bankrupt Ordered in a General Equity Receivership Instituted Within Four Months Prior to the Filing of the Petition in Bankruptcy.

It is settled law that where, as in this case, the property of the bankrupt is in the hands of a receiver appointed in a general insolvency proceeding instituted within four months prior to bankruptcy, the Bankruptcy Court has paramount and exclusive jurisdiction over the property in the receiver's possession.

This fundamental rule in bankruptcy is expressed by this court in *Taylor* v. *Sternberg,* 293 U. S. 470, at p. 472:

> "Upon such filing (*petition in bankruptcy*), the jurisdiction of the bankruptcy court becomes paramount and exclusive; and thereafter that court's possession and control of the estate cannot be affected by proceedings in other courts, whether state or federal. (Citing cases.) This applies while the possession is constructive as well as when it becomes actual. (Citing cases.) * * *
>
> "In the present case, with the supervening bankruptcy, the possession of the state court came to an end, and that of the bankruptcy court immediately attached."

This pronouncement is in accord with the provisions of Section 69d of the Bankruptcy Act (Title 11, U. S. C. sec. 109d) which provides in pertinent part as follows:

> "* * * Such receiver or trustee, with knowledge of the bankruptcy proceeding, shall make no disbursements or take any action in the administration of the property in his charge without first obtaining authorization therefor from the bankruptcy court."

Petitioner has not cited any contrary authority.

The exclusive and paramount control of the Bankruptcy Court over the assets here involved is not affected by the Ohio receiver's possession, since the Ohio insolvency proceeding was not in the enforcement of liens antedating bankruptcy by more than four months. Under such circumstances the Ohio receiver's possession is not adverse to the Bankruptcy Court and the constructive possession of the property is in the Bankruptcy Court since the date of the filing of the petition in bankruptcy.[4]

The entry of the order of confirmation was not a ministerial act but involved the exercise of discretion by the Ohio Court[5] and such order was an attempt by that court to administer, and, in fact, to dispose of the bankruptcy estate in derogation of the exclusive and paramount jurisdiction of the Bankruptcy Court. Such action by the Ohio Court was an attempt to transfer the title of the trustees in bankruptcy to the property involved, which had vested in the trustees as of the date of the filing of the petition in bankruptcy pursuant to the provisions of Section 70a (5) of the Bankruptcy Act (Appendix p. 17).

The order of confirmation is, perforce, a nullity. Not only was the Ohio Court without power to confirm after the filing of the petition in bankruptcy but such power could not have been conferred upon it, since the Bankruptcy Court is powerless to surrender its paramount and exclusive jurisdiction in the administration of the bankrupt's estate.[6]

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4. *Taylor* v. *Sternberg*, 293 U. S. 470, 473.
In re Watts, 190 U. S. 1, 27.
Moore v. *Scott* (C. A. 9, 1932), 55 F. (2d) 863, 865.

5. *Soutter* v. *M. & M. R. Co.*, 72 U. S. 5 Wall. 660, 662.
Reed v. *Radigan*, 42 Ohio State 292, 294.

6. *Isaacs* v. *Hobbs Tie and Timber Co.*, 282 U. S. 734, 739.
United States Fidelity & G. Co. v. *Bray*, 225 U. S. 205.
In re Diamond's Estate (C. A. 6), 259 F. 70, 73, *et seq.*

Petitioner, in a letter of January 9, 1951, to the respondents, stated that it would amend its petition *inter alia* to cite *Jelks* v. *Aetna Life Ins. Co.* (C. A. 10), 134 F. (2d) 870, for the proposition that where a purchaser at a judicial sale becomes the equitable owner prior to confirmation, the Bankruptcy Court acquires no jurisdiction over the property sold. As petitioner points out in its letter, the proceeding in that case was under Section 75 of the Bankruptcy Act. To secure the relief under that section the debtor must have some interest in the property sought to be affected. In view of the fact that the debtor's property there had been foreclosed in the state court and a sale had, which, by virtue of the statutes of Oklahoma, divested the debtor of all equity of redemption, the court held that the debtor had no interest in the property under the express provisions of Section 75 of the Bankruptcy Act as to permit him thereafter to seek the relief afforded by the Act. This case does not in any way infringe upon the well settled law that the jurisdiction of the Bankruptcy Court is paramount and exclusive over the assets of a debtor in the hands of a receiver appointed in an insolvency proceeding within four months prior to bankruptcy.

IV.

The Proviso of Section 67 a(3) of the Bankruptcy Act Affords the Petitioner No Relief, Since the Petitioner, as the Highest Bidder at a Judicial Sale Subject to Confirmation, Had Not Acquired the Title of a Bona Fide Purchaser.

Petitioner urges (petition p. 8) that Ohio law should determine the title and the rights acquired by it as the highest bidder at the Ohio receiver's sale, and that under Ohio law, where no ground exists for setting the sale aside, the highest bidder is the equitable owner and has

title to the property which is protected by the proviso of Section 67a(3) (Appendix p. 17). The law of Ohio, as will be shown, does not differ from applicable decisions of United States Courts that judicial sales are not complete prior to confirmation; that the highest bidder is not a purchaser; and that he is not vested with even equitable title prior to confirmation.[7]

While certain of the cases cited by the Court of Appeals (R. 324), and herein set forth, involved proceedings in bankruptcy and in admiralty, the statements of the courts are statements of the law pertaining generally to judicial sales.

Albeit the law of Ohio does not differ from the law as expressed in the decisions of the United States Courts, the sale in the instant case ordered by the Ohio Court (a United States District Court) was not pursuant to Ohio law, but was governed by the provisions of Section 2004 of Title 28 U. S. C. which provides in pertinent part as follows:

> "Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with Section 2001 of this title, unless the court orders otherwise."

The conditions of the sale thus are governed by the Federal statute and the rights acquired by the petitioner as the highest bidder prior to confirmation while the sale

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7. *In re Klein's Rapid Shoe Repair Co.* (C. A. 2, 1931), 54 F. (2d) 495, 496.
Hartford Accident & Indemnity Co. v. *Crow* (C. A. 6, 1936), 83 F. (2d) 386, 387.
Matter of Wolke Lead Batteries Company (C. A. 6, 1923), 294 F. 509, 510.
The East Hampton (C. A. 2, 1931), 48 F. (2d) 542, 544.
In re Realty Foundation (C. A. 2, 1935), 75 F. (2d) 286, 288.
Heller v. *Lamar* (App. D. C.), 77 F. (2d) 389, 390.
Brennan v. *Trimpert Rough Hat Co.* (D. C. Conn., 1934), 8 F. Supp. 926, 928.

was still incomplete, are governed by applicable decisions of the United States Courts pertaining to judicial sales.

The Rules of Decision Act, Title 28 U. S. C., sec. 1652, and *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, can have no applicability, since the Ohio receiver's sale was governed by an act of Congress (Title 28, U. S. C., sec. 2004).

Petitioner, in the letter dated January 9, 1951, addressed to respondents, stated that its petition for certiorari was intended to be amended *inter alia* to cite *State Bank of Hardinsburg* v. *Brown,* 317 U. S. 135, apparently for the proposition that state law is determinative of the effect of a judicial sale. That case involved a proceeding under Section 75 of the Bankruptcy Act relating to Agricultural Compositions and Extensions. The sole issue was whether the farmer debtor had any interest in his mortgaged premises as to secure the relief available under Section 75 where, at the time of the filing of his petition, the mortgaged premises had been foreclosed in the state court, the property sold and under State Statute he was divested by virtue of the sale of the equity of redemption. The debtor, having lost his equity of redemption, had no interest under the express provisions of Section 75 as to make available the relief under the Act. By no process of reasoning can the foregoing case be considered as bearing even remotely on the question of applicability of local law to the case at bar.

If we assumed, *arguendo,* that the laws of Ohio are applicable in determining the interest in the property acquired by the petitioner at the Ohio receiver's sale, the fact is that the Ohio courts also hold that prior to confirmation the highest bidder at a judicial sale, subject to confirmation, acquires no vested right in the property[8]

8. *Reed* v. *Radigan* (1884), 42 Ohio State, 292, 294; 24 Ohio Jurisprudence 79.

and the sale is not complete until confirmation;[9] prior to which the debtor is a preferred proposer and not the purchaser.[10]

The Supreme Court of Ohio in *Reed* v. *Radigan* (1884), 42 Ohio State 292, stated at page 294:

> "It will be found upon an examination of the authorities, that in states where confirmation is required, the purchaser obtains no vested rights until after the sale is confirmed * * *."

In *Weir* v. *Snider Saw Mill Co.* (1913), 88 Ohio State 424, the court stated at page 430:

> "It was a sale made by a court of competent jurisdiction in a pending proceeding by an officer authorized by law for that purpose, and confirmation was necessary. The sale in question was, therefore, a judicial sale, a distinguishing feature of which, as has been held by this court, is that it must be confirmed by the court before it will be complete."

The Court of Appeals for the 6th Circuit, applying Ohio law in *Hoyd* v. *Citizens Bank of Albany Co.* (1937), 89 F. (2d) 105, 108, held that the debtor's interest in his property is not lost upon sale but only upon confirmation, since under Ohio law a judicial sale is not complete until confirmation. While this latter case involves a statute of Ohio, the requirement of confirmation before a judicial sale is complete obtains in all judicial sales. It is apparent, therefore, that under Ohio law the petitioner acquired no vested rights in the property prior to confirmation and that the title to the property was in the debtor at the time of the filing of the bankruptcy petition and concurrenly therewith title became vested, under the pro-

9. *Weir* v. *Snider Saw Mill Co.* (1913), 88 Ohio State, 424, 430.
Howell v. *French* (1944), 74 O. App. 257.
Beaumont v. *Herrick*, 24 Ohio State 456.
24 Ohio Jurisprudence 60.

10. 24 Ohio Jurisprudence 79.

visions of Section 70a of the Bankruptcy Act, in the trustees in bankruptcy later elected.

Petitioner relies only on *Parker* v. *Storts* (1864), 15 Ohio State 351, 354, in support of its claim that the highest bidder at a judicial sale is the equitable owner of the property prior to confirmation. In that case the court was called upon to determine, *after confirmation,* the rights of the debtor as against the purchaser at the sale to crops planted by the debtor in the period between sale and confirmation. The court, considering the rights of the parties in the light of a confirmed sale, held that the crops belonged to the purchaser and that the debtor could not by his unauthorized act prolong his possession of the real estate. The court was not dealing with an unconfirmed sale, as in the instant case.

Treating the highest bidder as the equitable owner prior to confirmation is a legal fiction which the Ohio Courts employ after confirmation, under certain circumstances, to protect the purchaser. As an Ohio Court said in *Johnson* v. *Cincinnati,* 11 O. C. C. (N. S.) 344, 346:

> "This is a fiction of the law founded in equity, and is for the protection of the purchaser and goes no further. It does not mean that the purchaser was the owner before the confirmation of the sale."

The decision in *Parker* v. *Storts,* 15 Ohio State, 351, has no persuasive effect in so far as the status of a bidder at an unconfirmed judicial sale is concerned and can have no applicability where, as in the instant case, the Ohio Court could not, after supervising bankruptcy, confirm the sale.

Subsequent to *Parker* v. *Storts,* 15 Ohio State, 351, which was decided in 1864, are the decisions of the Supreme Court of Ohio in *Reed* v. *Radigan* (1884), 42 Ohio State 292, and *Weir* v. *Snider Saw Mill Co.* (1913), 88 Ohio State 424, and the decision of the United States Court of Appeals for

the 6th Circuit, in *Hoyd* v. *Citizens Bank of Albany Co.* (1937), 89 F. (2d) 105, to the effect that in Ohio the highest bidder at a judicial sale is not vested with any rights and that prior to confirmation the title to the property remains in the debtor.

Petitioner, at page 9 of its petition, refers to *Oviatt* v. *Brown*, 14 Ohio 285 and to *Boyd* v. *Longworth*, 11 Ohio 235. Both of these cases involve a sheriff's sale, which by Ohio statute relating to sheriff's sales, vested title in the purchaser at the date of sale. These cases can have no applicability to a judicial sale by a receiver made, as here, subject to confirmation by the court of his appointment.

The argument of the petitioner commencing at page 11 of its petition, that the appointment of the Ohio receiver was the levy of an equitable execution upon all assets coming into the receiver's possession and fastened a judicial lien thereon, is not material or relevant because the petitioner did not, as the highest bidder, acquire the title of a bona fide purchaser within the proviso of Section 67a(3) (Appendix, p. 17).

V.

The Decision of the Court of Appeals Is Not Contrary to Any Policy Concerning the Stability of Judicial Sales.

The policy anent the maintenance of the stability of judicial sales is that a completed sale where title has passed shall not be avoided. This is the plain language of and the only construction that can be given to Section 67a(3) of the Bankruptcy Act. If it be otherwise, then the pronouncement of this court in *Taylor* v. *Sternberg*, 293 U. S. 470, and the provisions of Sections 69d and 70a(5) of the Bankruptcy Act are nullified, because the paramount jurisdiction of the bankruptcy court could be rendered impo-

tent and the title of the trustees in bankruptcy divested by the order of the non-bankruptcy court.

Every bidder at a judicial sale must know that his bid must be confirmed before he acquires the property and that the possible intervention of the superior jurisdiction of the bankruptcy court always exists as a limitation on the non-bankruptcy court's power to vest title in the bidder by confirmation. In this case such knowledge was real for as petitioner states in its petition at page 14 "bankruptcy commonly follows in the wake of a judicial sale".

Conclusion.

The decision of the Court of Appeals is clearly correct. It is based on the applicable decisions of this Court and the provisions of the Bankruptcy Act. It is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted.

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APPENDIX.

Act of June 22, 1938, c. 575, 52 Stat. 840:

"Sec. 67 (Title 11, U. S. C., sec. 107). LIENS AND FRAUDULENT TRANSFERS.

"a.(1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition in bankruptcy * * * by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent * * *.

* * * * *

"(3) The property affected by any lien deemed null and void under the provisions of paragraphs (1) and (2) of this subdivision a shall be discharged from such lien, and such property * * * shall pass to the trustee or debtor, as the case may be * * * *Provided, however*, That the title of a bona-fide purchaser of such property shall be valid, but if such title is acquired otherwise than at a judicial sale held to enforce such lien, it shall be valid only to the extent of the present consideration paid for such property."

Act of June 22, 1938, c. 575, 52 Stat. 879:

"Sec. 110 (Title 11, U. S. C., sec. 70). TITLE TO PROPERTY.

"a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or of the original petition proposing an arrangement or plan under this title, except insofar as it is to property which is held to be exempt, to all * * *

* * * * *

"(5) property including rights of action, which prior to the filing of the petition he could by any means have transferred * * *."